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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

ROBERT LEON BUCKNER, Plaintiff	:	
v.	:	Civil No. 1:CV-00-1594
	:	(Caldwell, J.)
DR. ANTHONY BUSSANICH, M.D., and DONALD ROMINE, Warden, USP, Defendants	:	

BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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Dated: January 29, 2001

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I. Procedural History

Plaintiff is Robert Leon Buckner, an inmate incarcerated at the Federal Prison Camp in Lewisburg, Pennsylvania ("FPC Lewisburg"). On September 8, 2000, Buckner initiated this Bivens cause of action against Donald Romine, Warden, and Anthony Bussanich, M.D., Chief Medical Officer. Buckner seeks monetary and injunctive relief based on the Defendants' alleged refusal to provide proper treatment for his Meniere's disease. Specifically, Buckner requests punitive and compensatory damages against the named Defendants and that he immediately resume his medical "regimen" of the drug clonazepam. (See Compl. at 3, ¶¶ 8, 10.)

Buckner's complaint was originally dismissed on September 28, 2000, without prejudice, for failure to exhaust administrative remedies. However, upon consideration of a motion by Buckner, the case was reopened on November 8, 2000, and service of process was ordered "to explore whether a prisoner can maintain a cause of action after he has perhaps *inadvertently* defaulted on his administrative remedies." (Order dated November 8, 2000, at 2.)(Emphasis added.)

On January 12, 2001, a motion to dismiss was filed on behalf of the Defendants. This brief is submitted in support of that motion in accordance with M.D. Pa. Local Rule 7.5.

II. Statement of Facts

Buckner was committed to federal custody on April 4, 2000. (Exh. 1 at 4.[1]) On April 5, 2000, his case manager at FPC Allenwood discussed with him the Bureau of Prisons' Administrative Remedy Program. Buckner's signature on Form BP-5597.053, "Unit Admission And Orientation Program Checklist," clearly indicates Buckner was oriented and had an opportunity to discuss the Administrative Remedy Program with his unit team. (Id. at 7.)

On April 26, 2000, the Camp Administrator discussed the Administrative Remedy Program with Buckner. Buckner's signature on Form BP-5518.052, "Admission And Orientation Program Checklist," clearly indicates he attended all classes of the admission and orientation program and received information regarding the Administrative Remedy Program. (Id. at 9-9A.)

On July 21, 2000, Buckner submitted a completed "Informal Resolution Attempt" form to staff expressing his dissatisfaction with the reduction and eventual discontinuation of Klonopin as treatment of his Meniere's disease. (Id. at 16.) In response,

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[1] Defendants have submitted evidentiary materials in conjunction with their Rule 12(b)(1) motion to dismiss. Where a defendant moves for dismissal based on lack of subject matter jurisdiction, the Court is permitted to consider additional evidentiary materials in determining whether subject matter jurisdiction exists without converting the motion to one for summary judgment. Robinson v. Dalton, 107 F.3d 1018, 1021 (3d Cir. 1997) (quoting Mortensen v. First Federal Sav. and Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977)).

the Acting Assistant Health Services Administrator explained to Buckner that "Clonazepam (Klonopin) is **NOT** the treatment of choice for 8th nerve damage nor it is [sic] the drug of choice for Meniere's disease." (Id. at 15 (emphasis in original).) The response also provided information regarding the recommended course of treatment for Buckner's dizziness and Meniere's disease. (Id.)

On August 3, 2000, Buckner submitted a Request for Administrative Remedy to Warden Romine asking that treatment of his Meniere's disease with Clonazepam be continued. (Id. at 11-13.) In a response dated August 24, 2000, Buckner was informed that Bureau of Prisons' treatment guidelines require patients arriving with a current treatment regimen of Clonazepam to be tapered from the drug, with substitution of a non-benzodiazepine if clinically indicated. It was also noted that the psychiatrist at the United States Medical Center for Federal Prisoners recommended completely discontinuing Buckner from receiving the drug Clonazepam over the course of one month. Buckner's medication was being slowly tapered over the course of four months. Buckner was informed that if an anti-anxiety agent is required, then one other than benzodiazepine would be added. Based on this information, Buckner's request for relief was denied. Buckner was informed that he had twenty (20) calendar days to appeal to the Regional Office if he was dissatisfied with

the Warden's response. (Id. at 14.) However, within four days of the date of the Warden's denial, Buckner submitted the instant complaint to the Court for filing. According to Bureau of Prisons' computerized records, Buckner never submitted either a Regional Administrative Remedy Appeal to the Regional Office or an Administrative Remedy Appeal to the Central Office. (Id. at 19.)

III. Question Presented

Should the complaint be dismissed for Buckner's failure to exhaust the Bureau of Prisons' Administrative Remedy Procedure for Inmates?

Suggested answer in the affirmative.

IV. Argument

In evaluating a motion to dismiss, the Court must accept all material allegations of the complaint as true and construe all inferences in the light most favorable to the plaintiff. Pennsylvania House. Inc. v. Barrett. 760 F. Supp. 439, 449 (M.D. Pa. 1991). "[C]onclusory allegations of law, unsupported conclusions and unwarranted inferences need not be accepted as true." Id. at 449-50. A case may be dismissed for failure to state a claim upon a showing that when all facts alleged by the plaintiff are interpreted in his favor, the plaintiff has failed to state facts which would entitle him to relief. Conley v. Gibson, 355 U.S. 41 (1957); ALA, Inc. v. CCAIR, Inc, 29 F.3d 855,

855, 859 (3d Cir. 1994). In the present case, even if the Court takes every fact as pleaded, the governing law still would not permit this action. Thus, for the reasons stated below, Defendants' motion to dismiss should be granted.

A. BUCKNER INTENTIONALLY FAILED TO EXHAUST HIS ADMINISTRATIVE REMEDIES; FURTHERMORE, HE DEFAULTED ON HIS ADMINISTRATIVE REMEDY, THUS, BARRING HIS CLAIM.

1. Exhaustion

Congress has delegated to the Attorney General, and in turn to the Bureau of Prisons, wide discretion in promulgating rules and regulations governing the lives of inmates, including providing "for their proper government, discipline, treatment, care, rehabilitation and reformation." 18 U.S.C. § 4001 (1997). In accordance with this congressional mandate, the Bureau of Prisons administers an in-house procedure by which prison inmates may seek formal review of a complaint which relates to any aspect of their imprisonment. See 28 C.F.R. § 542. Under this administrative procedure, an inmate is advised to initially seek informal discussion and resolution of their problem(s) with prison staff. See 28 C.F.R. § 542.13(a). If this fails, the inmate must then follow a more formal set of procedures.

First, the inmate may raise his complaint to the warden of the institution where he is confined. An inmate who is not satisfied with the warden's response may appeal to the Regional Director within twenty (20) calendar days from the date the

warden signed the response. 28 C.F.R. § 542.15(a). An appeal of the Regional Director's decision may then be made to the Central Office of the Federal Bureau of Prisons. 28 C.F.R. §§ 542.14, 542.15. No administrative remedy appeal is considered to have been finally exhausted until considered by the Bureau of Prisons' Central Office.

When Buckner was not successful at an informal resolution of his complaints regarding his medical treatment, he properly filed a formal administrative remedy with the Warden of USP Lewisburg on August 3, 2000. (Exh. 1 at 11.) A response was issued August 24, 2000, informing Buckner that the medical decision had properly been made pursuant to Bureau of Prisons' treatment guidelines. (Id. at 14.) According to Bureau of Prisons' records, no further attempt was made to pursue the administrative remedy process. (Id. at 19.) In fact, it is noted that Buckner's complaint is dated August 28, 2000--only four days after the date of the Warden's response.

In order for Buckner to have properly appealed the Warden's response to the Regional Office before filing suit, he would have been required to file an appeal within twenty (20) calendar days of the date the Warden signed the response. See 28 C.F.R. § 542.16. However, if he could have demonstrated a valid reason for delay, Buckner could have requested an extension of time to

file the appeal. Title 28 C.F.R. § 542.14(b) defines a valid reason as the following:

> . . . an extended period in-transit during which the inmate was separated from documents needed to prepare the Request or Appeal; an extended period of time during which the inmate was physically incapable of preparing a Request or Appeal; an unusually long period taken for informal resolution attempts; indication by an inmate, verified by staff, that a response to the inmate's request for copies of dispositions requested under § 542.19 of this part was delayed.

28 C.F.R. § 542.14(b).

The Court has reinstated this action in order to answer the question of whether Buckner can maintain a cause of action "after he has perhaps *inadvertently* defaulted on his administrative remedies." (Order dated November 8, 2000, at 2.) Buckner does not allege that he was in-transit between institutions, that he was physically incapable of preparing an appeal, that a long period was taken for informal resolution, or that he requested copies which caused a delay for filing an appeal. Buckner cannot demonstrate any of the valid reasons set forth in 28 C.F.R. 542.14(b) which would allow him to pursue an administrative remedy after he failed to meet the established time requirements.

Rather, Buckner argues that the deadline for appealing the denial of his administrative remedy request has now expired and, as such, the administrative process is no longer available to him. Specifically, Buckner claims his recent requests for the appeal forms have been denied by prison officials because the

twenty-day period has passed. (Motion to Reconsider Dismissal of Complaint at 1.)

There is no indication in either Buckner's complaint or in his motion to reconsider that he ever requested and/or was denied the appeal forms prior to the twenty-day expiration date. Buckner was educated on the administrative process *twice* in April of 2000--less than four months prior to commencing the administrative remedy process at the institution level. (See Exh. 1 at 7, 9.) He was also informed in the Warden's response to his administrative remedy request that he had twenty days to appeal to the Regional Office. (Id. at 14.) In a blatant disregard for the administrative policy, however, Buckner sought judicial intervention within *four days* of the Warden's response. Buckner never gave prison officials the opportunity to deny him the forms. It was not until after he filed his complaint and the Court dismissed it for lack of exhaustion that he even attempted to complete the exhaustion requirement. Buckner willfully, not "inadvertently," bypassed the administrative process.

On April 26, 1996, four years before Buckner filed suit, President Clinton signed into law the Omnibus Consolidated Rescissions and Appropriations Act. Title VIII of that omnibus appropriations bill is the Prison Litigation Reform Act of 1995 ("PLRA") which contains amendments significantly affecting prison litigation. The PLRA became effective on the date of its

enactment, Martin v. Hadix, 527 U.S. 343 (1999), and applies to all prisoner complaints filed after that date. Ghana v. Holland, 226 F.3d 175 (3d Cir. 2000); Ridenour v. Davis, 229 F.3d 1153 (Table), 2000 WL 1175368, *2 (6th Cir., Aug. 11, 2000)(copy attached); Thaddeus-X v. Wozniak, 215 F.3d 1327 (Table), 2000 WL 712383, **3 (6th Cir., May 23, 2000)(copy attached); Garrett v. Hawk, 127 F.3d 1263, 1266 (10th Cir. 1997).

As a result of the PLRA, 42 U.S.C. § 1997 now includes a statutory exhaustion requirement which states:

> No action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

42 U.S.C. § 1997e(a) (1996) (emphasis added). Thus, under the PLRA, a federal prisoner is required to exhaust his administrative remedies before filing a complaint. The Third Circuit has held that, "no action shall be brought in federal court until such administrative remedies as are available have been exhausted." Nyhuis v. Reno, 204 F.3d 65, 78 (3d Cir. 2000); Booth v. Churner, 206 F.3d 289 (3d Cir.), cert. granted, ___ U.S. ___ 121 S. Ct. 377 (Oct 30, 2000) (NO. 99-1964).

Prior to the amendment of § 1997e(a), Congress did not *require* exhaustion but rather vested power in the federal courts

to make such determinations. Nyhuis, 204 F.3d at 73. As amended, however, § 1997e(a) now eliminates such discretion. "It 'specifically mandates' that inmate-plaintiffs exhaust their available administrative remedies, . . . by providing that '[n]o action shall be brought' until the inmate--plaintiff has done so. Accordingly, it is beyond the power of this Court--or any other--to excuse compliance with the exhaustion requirement, whether on the ground of futility, inadequacy or any other basis." Id. (citations omitted). See also Booth v. Churner, 206 F.3d at 299.

Claims for monetary relief should not be exempted. To do so would frustrate the intent of the PLRA. "It would enable prisoners, as they became aware of such an exemption, to evade the exhaustion requirement, merely by limiting their complaints to request for money damages. . . . Such a result would do little to 'stem the tide of meritless prisoner cases' as Congress intended." Id. at 74 (quoting Beeson v. Fishkill Correctional Facility, 28 F. Supp.2d 884, 894-95 (S.D.N.Y. 1998)).

As noted by the Court in its November 8, 2000, Order, § 1997e(a) is not a jurisdictional requirement, such that failure to comply with the section would deprive federal courts of subject matter jurisdiction. Nyhuis, 204 F.3d at 69 (citing Massey v. Helman, 196 F.3d 727, 732 (7th Cir. 1999)). However, dismissal of a plaintiff's complaint is appropriate when an inmate-plaintiff like Buckner has failed to exhaust his available

administrative remedies before bringing an action under § 1983. Booth, 206 F.3d at 289 n.3, 300 (district court appropriately dismissed action even though time for plaintiff to cure defect in complaint is long past); Ahmed v. Sromovski, 103 F. Supp.2d 838, 843 (E.D. Pa. 2000).

It is interesting to note that § 1997e(a) now also precludes a futility exception to its mandatory exhaustion requirement "in any case." Nyhuis, 204 F.3d at 71; Booth, 206 F.3d at 300. "Although it may make sense to excuse exhaustion of the prisoner's complaint where the prison system has a flat rule declining jurisdiction over [claims involving only money damages], it does not make sense to excuse the failure to exhaust when the prison system will hear the case and attempt to correct legitimate complaints, even though it will not pay damages." Id. In Buckner's case, he claims the administrative remedy process is no longer "available" to him because he is time-barred. In Lavigne v. Zoda, No. 4:CV-98-0703, slip op., (M.D. Pa., Oct. 19, 2000)(Muir, J.)(copy attached), Judge Muir determined that the Court "need not predict the manner in which the Bureau of Prisons will consider any potential administrative claim filed by [plaintiff]. The two controlling cases, Booth and Nyhuis, convince us that the case should be dismissed without prejudice." Slip op. at 6.)

Notwithstanding the mandatory language of the amended § 1997e(a), however, the Nyhuis Court noted that compliance with the administrative remedy scheme will be satisfactory *if it is substantial*." 204 F.3d at 77-78 (citing Miller v. Tanner, 196 F.3d 1190, 1194 (11th Cir. 1999)(recognizing and applying the substantial compliance doctrine); Wyatt v. Leonard, 193 F.3d 876, 879-80 (6th Cir. 1999)(same)). Buckner's cause of action arose just this past year. However, it is only when a prisoner's claim arose *before* April 26, 1996--the effective date of the PLRA--that a prisoner must show that he substantially complied with the exhaustion requirement by making a good faith attempt to reach the appropriate prison official. See Wolff v. Moore, 199 F.3d 324, 327 (6th Cir. 1999); Wyatt, 193 F.3d at 880.

Caselaw applying the substantial compliance doctrine in the PLRA is still developing. However, in Ahmed v. Sromovski, 103 F. Supp. 838 (E.D. Pa. 2000), the district court rejected the plaintiff's argument that although he filed untimely appeals, he "substantially complied" with the exhaustion requirement. The plaintiff did not attempt to appeal the initial determination of his grievance to the second level (which was returned as "untimely") and third level of review until five months after filing his case in court--two days after defendants raised the exhaustion issue. In addition to noting the plaintiff's failure to comply with administrative procedures for filing appeals, the

district court determined the untimely appeals to be contrary to the policy considerations underlying the PLRA's exhaustion requirement and the spirit of Nyhuis. ("The Third Circuit has interpreted § 1997e(a) as establishing a bright line rule; 'we are not prepared to read . . . § 1997e(a) as meaning anything other than what it says--i.e., that no action shall be brought in federal court until such administrative remedies as are available have been exhausted.'" Ahmed, 103 F. Supp. at 844 (quoting Nyhuis, 204 F.3d at 78).)

Buckner may attempt to argue that he "substantially complied" with the Bureau of Prisons' administrative remedy procedure. However, in addition to being barred from doing so because his claim arose *after* April 26, 1996, Bureau of Prisons' records reveal Buckner has only ever filed--or attempted to file--at the first level of the administrative remedy process. (See Exh. 1 at 19.) Thus, to date, Buckner has not even attempted to appeal the Warden's response, and cannot support any claim of substantial compliance.

The Bureau of Prisons' regulations clearly set forth, in specific detail, the proper procedures for filing administrative remedies, including form, deadlines, exceptions, extensions of time, assistance, etc. See 28 C.F.R. § 542.10, et seq. Buckner was apprised of the Bureau of Prisons' Administrative Remedy Procedure for Inmates on April 5, 2000--within one day of his

arrival at USP Lewisburg--and again on April 26, 2000. (Exh. 1 at 7, 9.) He was therefore fully aware of the policy. Additionally, Buckner was informed in the Warden's response that he only had twenty days to appeal to the Regional Office. (Exh. 1 at 14.) Buckner knew enough to file the first level of the administrative process. There is no excuse for failing to timely file with the Regional and Central Offices, especially since the regulations also provide for extensions of time of the filing deadlines for good cause. See 28 C.F.R. § 542.14(b).

The exhaustion doctrine has been developed to facilitate judicial review by allowing the appropriate agency to develop a factual record and apply its expertise, to conserve judicial resources, and to follow the defendant agency the first opportunity to correct its own errors. See Moscato v. Federal Bureau of Prisons, 98 F.3d 757 (3d Cir. 1996). If a federal prisoner fails to follow the detailed procedures and guidelines to exhaust his administrative remedies, the action cannot be maintained.

In Underwood v. Wilson, 151 F.3d 292, 294-95 (5th Cir. 1998), the Fifth Circuit was faced with determining whether the fact that the inmate plaintiff's administrative remedies were exhausted after he filed his § 1983 suit, rather than before, justified dismissal. Although the court noted the inefficiency of dismissing the suit and requiring the plaintiff to refile, it

affirmed the district court's dismissal, stating that "dismissal may serve as a deterrent to premature filing by Underwood and other potential litigants, thus serving the Congressional purpose of providing relief from frivolous prisoner litigation." 151 F.3d at 296.

In light of Buckner's failure to exhaust his available administrative remedies, the complaint should be dismissed without a merits analysis of his claim. Nyhuis v. Reno, 204 F.3d at 78 (affirming the dismissal of plaintiff's complaint for failure to exhaust, but vacating that portion of the district court's opinion addressing the merits of plaintiff's claims explaining that the Magistrate Judge should not have reached the merits of plaintiff's action); Booth v. Churner, 206 F.3d at 300; Hill v. Jones, 211 F.3d 1269 (Table), 2000 WL 571948 (6th Cir. 2000)(before district court adjudicates merits, court must determine that plaintiff has complied with exhaustion requirement under PLRA)(copy attached); Perez v. Wisconsin Department of Corrections, 182 F.3d 532, 534-35 (6th Cir. 1999) ("application of a law designed to prevent decision on the merits cannot be avoided . . . ."); Ahmed v. Sromovski, 103 F. Supp.2d at 843.

Additionally, it should be noted that with the enactment of the PLRA, a "continuance" of the case pending exhaustion is no longer an option.

> The version of § 1997e(a) that predated the PLRA permitted a court to 'continue such case for a period

> of not to exceed 180 days in order to require exhaustion of such plain, speedy, and effective administrative remedies as are available.' In 1996 Congress deleted the requirement that the administrative remedy be 'plain, speedy, and effective', and when these words left the statute so did any warrant to inquire whether exhaustion would be unavailing. . . [T]he difference between the pre-1996 version of § 1997e(a), which allowed a judge to "continue" the suit, and the PLRA version, which makes exhaustion a precondition to suit, . . . supports [the Sixth Circuit's] principal conclusion that a case filed before exhaustion has been accomplished must be dismissed.

Perez v. Wisconsin Department of Corrections, 182 F.3d at 537 (citations omitted). See also Underwood, 151 F.3d at 294. For these reasons, Buckner's complaint should be dismissed. See Lavigne v. Zoda, No. 4:CV-98-0703, slip op., (M.D. Pa., Oct. 19, 2000)(Muir, J.)(copy attached).

Furthermore, even under settled Third Circuit law decided prior to the PLRA, an inmate like Buckner who files a Bivens action seeking more than just money damages must exhaust his administrative remedies. Young v. Quinlan, 960 F.2d 351, 356 n.8 (3d Cir. 1992); Lyons v. United States Marshals Service, 840 F.2d 202 (3d Cir. 1988); Veteto v. Miller, 794 F.2d 98, 100 (3d Cir. 1986). In Rojas v. Williams, et.al., Civil Action No. 92-1514, slip op., (M.D. Pa., May 27, 1993)(copy attached), a Bivens-type action against USP Lewisburg staff members filed by an inmate for alleged medical malpractice in which the inmate requested, inter alia, "any other relief the court deems just," Judge Conaboy held that the case should be dismissed for "failure to exhaust

administrative remedies as required by law." Slip op. at 12. Buckner seeks both monetary and injunctive relief. Thus, for this additional reason, Defendants' motion to dismiss should be granted.

2. Procedural Default

Additionally, Buckner is now in procedural default. Although he contends that he attempted to exhaust his administrative remedies beyond the first level of the administrative process, he has not. As evidenced by the documents provided to the Court, Buckner has never even attempted to appeal the Warden's response to the Regional Director. (Exh. 1 at 19.) Accordingly, the period for filing is presently foreclosed. Thus, Buckner is precluded from litigating his claims in the instant case unless he can demonstrate "cause and prejudice." See Moscato v. Bureau of Prisons, 98 F.3d 757, 760-61 (3d Cir. 1996).

In Moscato, a federal inmate filed a habeas petition regarding a discipline hearing. The Third Circuit determined that a federal inmate committed procedural default when he failed to exhaust his administrative remedy by not filing a timely appeal, and because he could not show cause for the default, his habeas petition was barred from review on the merits. Moscato, 98 F.3d at 762 (3d Cir. 1996). The Court's decision in Moscato relied upon a Seventh Circuit opinion which held that a

prisoner's procedural default renders the administrative process unavailable, and the habeas claim was barred unless the inmate could demonstrate cause and prejudice. Moscato, 98 F.3d at 761 (citing Sanchez v. Miller, 792 F.2d 694, 699 (7th Cir. 1986)).

The "cause and prejudice" rule was originally articulated by the Supreme Court in Davis v. United States, 411 U.S. 233 (1973). The Court held that review of petitioner's habeas claim should be barred in the absence of a showing by the prisoner of cause for the failure to comply with procedural requirements and of actual prejudice resulting from the alleged constitutional violation. 411 U.S. at 243-45. See also Sanchez v. Miller, 792 F.2d 694, 698 (7th Cir. 1986).

In the instant case, Buckner submitted a Request For Administrative Remedy to the Warden, which was answered on August 24, 2000. Subsequently, on August 28, 2000, four days after receiving his response from the Warden, Buckner filed suit. He made no attempt to exhaust his available administrative remedy prior to filing suit, even after being informed of the administrative remedy program by two staff members and being instructed in the Warden's response that he needed to appeal to the Regional Office within twenty (20) days. (Exh. 1 at 14.)

Because the record is clear that Buckner never attempted to exhaust the second and third levels of the administrative process, he cannot show cause for the default. Since he cannot

show cause, the Court need not address the question of actual prejudice. Moscato, 98 F.3d at 762 (citing Caswell v. Ryan, 953 F.2d 853, 863 (3d Cir. 1992)).

It would be contrary to Congress's intent in enacting the PLRA to allow inmates to bypass the exhaustion requirement by declining to file administrative complaints and then claiming that administrative remedies are time-barred and subsequently not available. See Wright v. Morris, 111 F.3d 414, 417 (6th Cir. 1997); Boyd v. Department Of Corrections, 2000 WL 1073324 (E.D. Pa. 2000)("if Boyd's administrative remedies are now time-barred, the judgment of the Court [to dismiss the amended complaint with prejudice] will not be affected" as it would go against the intent of Congress). As such, without the prospect of a dismissal with prejudice, an inmate could evade the exhaustion requirement by filing no administrative remedy or by intentionally filing an untimely one, which would allow an inmate to bypass the administrative remedy process and gain access to a federal court without exhausting their available administrative remedy. Marsh v. Jones, 53 F.3d 707, 710 (5th Cir. 1995) Specifically, the Marsh Court held that, a "[d]istrict Court could dismiss a prisoner's section 1983 suit under § 1997(e) even when administrative relief is time-barred or otherwise precluded." Marsh, 53 F.3d at 710.

Buckner has failed to timely exhaust the Bureau of Prisons' administrative remedy procedure, thereby constituting procedural default on his part and mandating dismissal of the complaint for failure to exhaust. See Moscato, 98 F.3d at 760-61; Nigro v. Sullivan, 40 F.3d 990 (9th Cir. 1994); Sanchez v. Miller, supra. But see Lavigne v. Zoda, supra (the principle of a "procedural default" does not apply in a civil rights action for damages). Therefore, Buckner's complaint should be dismissed with prejudice.

V. Conclusion

For the reasons stated above, Defendants' motion to dismiss should be granted with a certification that any appeal would be deemed frivolous, lacking in probable cause, and not taken in good faith.

Respectfully submitted,

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Dated: January 29, 2001

229 F.3d 1153 (Table)
Unpublished Disposition

(Cite as: 229 F.3d 1153, 2000 WL 1175368 (6th Cir.(Ohio)))

NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA6 Rule 28 and FI CTA6 IOP 206 for rules regarding the citation of unpublished opinions.)

United States Court of Appeals, Sixth Circuit.

William L. RIDENOUR, Plaintiff-Appellant,
v.
Donald DAVIS; Brian Wittrup; Tami Marvin; Kevin Scott, Defendants-Appellees.

No. 99-4185.

Aug. 11, 2000.

Before KEITH, SILER, and BATCHELDER, Circuit Judges.

ORDER

**1 William L. Ridenour, a pro se Ohio prisoner, appeals a district court judgment dismissing his civil rights complaint filed pursuant to 42 U.S.C. § 1983. This case has been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R.App. P. 34(a).

Seeking monetary, declaratory, and injunctive relief, Ridenour sued multiple prison officials contending that the defendants retaliated against him for exercising his right of access to the courts and of access to the prison's grievance procedures. The district court dismissed all but two of Ridenour's allegations for failure to exhaust available prison administrative remedies. As to the remaining two allegations, the district court noted that these claims did not result in any prejudice. Therefore, the district court granted summary judgment to the defendants.

In his timely appeal, Ridenour argues that he did exhaust his available administrative remedies, that the district court should have allowed him to amend his complaint, and that the Prison Litigation Reform Act (PLRA) should not have been applied to him as he was incarcerated prior to the enactment of the statute.

The district court's judgment is reviewed de novo. See Rowley v.. United States, 76 F.3d 796, 799 (6th Cir.1996).

Upon review, we conclude that the district court properly dismissed Ridenour's complaint for failure to exhaust available administrative remedies. In Brown v. Toombs, 139 F.3d 1102, 1104 (6th Cir.1998), we held that inmates who file lawsuits in federal court challenging the conditions of their confinement pursuant to § 1983 must allege and show that they have exhausted all available state administrative remedies. A prisoner should attach to his § 1983 complaint the administrative decision, if available, showing the administrative disposition of his complaint. Id. When the record fails to disclose that the inmate has complied with the exhaustion requirements, the case should be dismissed without prejudice. Id.

Ridenour filed no documentation with his complaint showing that he exhausted his claims. Although Ridenour did file documents in response to the defendants' motion for summary judgment, these documents do not establish that Ridenour exhausted his available administrative remedies as to every claim raised. The district court correctly noted that the only issues which had completed the entire grievance process were Ridenour's complaint concerning the availability of notary services in one of the prison's dormitories and his complaint regarding the procedure for obtaining copies of documents for lawsuits. However, as the district court noted, these issues did not state a cause of action as Ridenour failed to allege any prejudice. See Pilgrim v. Littlefield, 92 F.3d 413, 415-16 (6th Cir.1996). Thus, the district court did not err in dismissing the complaint under Brown.

**2 Ridenour also argues that the district court should have allowed him to amend his complaint. The proposed amendment added new defendants that Ridenour asserted participated in the conspiracy alleged in his original complaint. However, as the complaint was dismissed under Brown, Ridenour is free to bring a new cause of action against the proposed defendants. The district court did not err in denying Ridenour leave to amend his complaint.

Finally, Ridenour contends that the PLRA is not applicable as he was incarcerated prior to the enactment of the statute. However, the statute is applicable to all cases filed on or after April 26,

1996, the effective date of the statute. See Brown, 139 F.3d at 1104. The argument is meritless.

Accordingly, we affirm the district court's judgment Rule 34(j)(2)(C), Rules of the Sixth Circuit.

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(Cite as: 215 F.3d 1327, 2000 WL 712383 (6th Cir.(Mich.)))

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NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA6 Rule 28 and FI CTA6 IOP 206 for rules regarding the citation of unpublished opinions.)

United States Court of Appeals, Sixth Circuit.

THADDEUS-X, Plaintiff-Appellant,
v.
Dan WOZNIAK, Fred Neubecker; Robert Aumiller; Arthur Barber, Defendants-Appellees.

No. 99-1720.

May 23, 2000.

Before MOORE and GILMAN, Circuit Judges; MCKEAGUE, District Judge . [FN*]

FN* The Honorable David W. McKeague, United States District Judge for the Western District of Michigan, sitting by designation.

ORDER

**1 Thaddeus-X appeals a district court order dismissing his civil rights action filed pursuant to 42 U.S.C. § 1983. The case has been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. See Fed. R.App. P. 34(a).

Seeking monetary relief, Thaddeus-X sued a Michigan correctional officer, Dan Wozniak, in his official and individual capacities, alleging that Wozniak retaliated against him for writing grievances and violated his First and Eighth Amendment rights. In an amended complaint, Thaddeus-X sued three more correctional employees, Neubecker, Barber, and Aumiller, alleging that these defendants also retaliated against him and violated his First and Eighth Amendment rights. The magistrate judge recommended granting summary judgment for defendant Wozniak on all claims, except for a claim of retaliatory cell transfer. The district court adopted this recommendation in part, rejected the recommendation as to the retaliatory transfer claim, and granted summary judgment to Wozniak on all claims. The magistrate judge next issued another report, in which he recommended granting summary judgment to the remaining defendants on all claims. After reviewing Thaddeus-X's objections to this report, the district court adopted the report and recommendation, granted summary judgment to the remaining defendants, and dismissed the case. Thaddeus- X has filed a timely appeal

We initially note that Thaddeus-X did not fully exhaust his administrative remedies prior to filing his federal suit, as is required under 42 U.S.C. § 1997e(a) . See Freeman v. Francis, 196 F.3d 641, 645 (6th Cir.1999). While we would normally remand this case to the district court for dismissal without prejudice, see id ., it appears from the record that Thaddeus-X has now fully exhausted his administrative remedies as to the claims in his complaint and that he would be able to re-file his complaint in a timely manner. See Mich. Comp. Laws § 600.5856; Sherrell v. Bugaski, 169 Mich.App. 10, 17 (1988); Meda v. City of Howell, 110 Mich.App. 179, 182-83 (1981). Since the district court has already addressed the merits of Thaddeus-X's claims, we choose to review the merits of the case at this time, rather than requiring the district court to undertake the redundant exercise of again discussing the merits upon re-filing of the complaint.

Upon review, we conclude that the district court properly granted summary judgment for the defendants. This court renders de novo review of district court orders granting summary judgment. See Lucas v. Monroe County, 203 F.3d 964, 971 (6th Cir.2000). Summary judgment is proper if no genuine issue exists as to any material fact and the moving party is entitled to judgment as a matter of law. See id. The moving party has the burden of showing an absence of evidence to support the non-moving party's case. See Covington v. Knox County School Sys., 205 F.3d 912, 914 (6th Cir.2000). Once the moving party has met its burden of production, the non-moving party must come forward with significant probative evidence showing that a genuine issue exists for trial. See id. The mere existence of a scintilla of evidence to support the plaintiff's position will be insufficient; rather, evidence must exist on which the jury can reasonably find in favor of the

plaintiff. See Morris v. Oldham County Fiscal Court, 201 F.3d 784, 788 (6th Cir.2000).

**2 Thaddeus-X's chief argument is that the district court applied the wrong standard in analyzing his retaliation claims; in essence, he is arguing that the district court wrongly concluded that the defendants were entitled to qualified immunity for his retaliation claims, as analyzed under this court's recent decision in Thaddeus-X v. Blatter, 175 F.3d 378 (6th Cir.1999) (en banc). However, we determine that the district court properly concluded that the defendants were entitled to qualified immunity. The affirmative defense of qualified immunity shields government officials from liability for civil damages insofar as their conduct does not violate clearly established constitutional rights of which a reasonable person would have known. See Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); Gardenhire v. Schubert, 205 F.3d 303, 310-11 (6th Cir.2000). When determining whether a right is "clearly established," the court must look to decisions of the Supreme Court, then to decisions of this court and other courts within our circuit, and finally to decisions of other circuits. See Gardenhire, 205 F.3d at 311. The contours of the right has to be sufficiently clear that a reasonable official would understand that what he is doing violates that right. See Anderson v. Creighton, 483 U.S. 635, 640 (1987); Gardenhire, 205 F.3d at 311.

The law concerning a prisoner's retaliation claim was not "clearly established" prior to the Thaddeus-X en banc decision. In that decision, the court noted that this circuit previously had applied inconsistent analyses for these retaliation claims, often requiring a prisoner to demonstrate that the defendant's conduct "shocks the conscience." See Thaddeus-X, 175 F.3d at 387-88. The court concluded that this analysis was in conflict with Supreme Court precedent and no longer the law of this circuit. See id. at 388. The court also noted that this conflicting case law was not unique to this circuit. See id. at 388 n. 4. This court has repeatedly referred to the Thaddeus-X decision as clarifying the law concerning retaliation claims. See Herron v. Harrison, 203 F .3d 410, 414 (6th Cir.2000); Shehee v. Luttrell, 199 F.3d 295, 301 n. 5 (6th Cir.1999), petition for cert. filed (Feb. 28, 2000) (No. 99- 8837); Mattox v. City of Forest Park, 183 F.3d 515, 521 (6th Cir.1999). Consequently, the analysis for retaliation claims, as set forth in Thaddeus- X, was not "clearly established" at the time of the defendants' alleged improper conduct in this case and the district court properly concluded that they are entitled to qualified immunity for claims based on that decision. Furthermore, and contrary to Thaddeus-X's argument, the district court properly examined whether the defendants violated the law that was "clearly established" at the time of the alleged improper conduct, i.e., the "shock the conscience" analysis. The district court properly concluded that the defendants were entitled to qualified immunity on the retaliation claims.

**3 The district court also properly dismissed Thaddeus-X's Eighth Amendment claims. In his complaints, Thaddeus-X alleged that the defendants subjected him to unconstitutional conditions of confinement and were deliberately indifferent to his serious medical needs. However, we note that, in his objections to the magistrate judge's report that recommended granting summary judgment for defendants Neubecker, Barber, and Aumiller, Thaddeus-X only raised a conclusory, one-sentence objection to the recommendation on his Eighth Amendment claims. This court requires litigants to file specific and timely objections to a magistrate judge's report and recommendation under 28 U.S.C. § 636(b)(1)(C) in order to preserve the right to appeal a subsequent order of the district court adopting that report. See Thomas v. Arn, 474 U.S. 140, 155 (1985) ; Willis v. Sullivan, 931 F.2d 390, 400-01 (6th Cir.1991). The filing of vague, general, or conclusory objections does not meet the requirement of specific objections and is tantamount to a complete failure to object. See Miller v. Currie, 50 F.3d 373, 380 (6th Cir.1995). Consequently, Thaddeus-X has waived review of his Eighth Amendment claims as to defendants Neubecker, Barber, and Aumiller.

As to Thaddeus-X's Eighth Amendment claims against defendant Wozniak, they are without merit. Thaddeus-X alleges that the defendant subjected him to deplorable and unconstitutional conditions of confinement, which resulted in difficulty eating and sleeping. He also alleges that the defendant deprived him of his HIV medication for two days and, because of this action, he was "very sick." However, Thaddeus-X does not allege that he suffered any actual physical injury as a result of the defendant's actions. 42 U.S.C. § 1997e(e) requires a prisoner to show that he suffered physical injury to successfully bring an Eighth Amendment claims. See Harper v. Showers, 174 F.3d 716, 719-20 (5th Cir.1999) (Eighth Amendment conditions of confinement claim); Perkins v. Kansas Dept. of Corrections, 165 F.3d 803, 807 (10th Cir.1999) (Eighth Amendment medical claim); Zehner v. Trigg, 133 F.3d 459, 461 (7th Cir.1997) (Eighth Amendment conditions of

confinement claim). To meet this requirement, Thaddeus-X must show that he suffered more than de minimis injury. See Harper, 174 F.3d 719. However, he has not made this showing. While Thaddeus-X argues that § 1997e(e) should not apply to his case, the provisions of the Prison Litigation Reform Act apply to all prisoner cases filed on or after April 26, 1996, the Act's effective date. See White v. McGinnis, 131 F.3d 593, 595 (6th Cir.1997); Wright v. Morris, 111 F.3d 414, 417 (6th Cir.1997). Thaddeus-X's initial complaint was filed in February 1997, well after the effective date of the Act.

Accordingly, this court affirms the district court's judgment. See Rule 34(j)(2)(C), Rules of the Sixth Circuit.

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UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA

STEVEN LAVIGNE,	:	
	:	
Plaintiff	:	No. 4:CV-98-0703
	:	
vs.	:	Complaint Filed 04/28/98
	:	
JOSEPH ZODA, ET AL.,	:	(Judge Muir)
	:	
Defendants	:	(Magistrate Judge Durkin)

ORDER

October 19, 2000

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

On April 24, 1998, Steven Lavigne instituted this action in which he seeks damages arising out of the Defendants' alleged violation of his Eighth Amendment rights by using excessive force upon him. Lavigne is proceeding pro se and in forma pauperis. The Defendants are four officials and employees at the United States Penitentiary at Allenwood in White Deer, Pennsylvania. This case was assigned to us but referred to Magistrate Judge Raymond J. Durkin for preliminary consideration. The background of this case up to June 12, 2000, is set forth in our order issued on that date.

On June 30, 2000, the Defendants filed a motion for summary judgment in which they contend that Lavigne has not exhausted his administrative remedies. After that motion was fully briefed, on August 16, 2000, Magistrate Judge Durkin issued a report recommending that the Defendants' motion be granted.

10/19/00
Mary E. D'Andrea
Deputy Clerk

On September 7, 2000, Lavigne timely filed objections to that report and recommendation. Although he failed to file a separate supporting brief, the Defendants filed an opposing brief on September 20, 2000. Lavigne's reply brief was due on October 10, 2000, and he chose to file none. The matter is ripe for disposition.

When objections are filed to a report of a magistrate judge, we make a de novo determination of those portions of the report or specified proposed findings or recommendations made by the magistrate judge to which there are objections. United States vs. Raddatz, 447 U.S. 667 (1980); 28 U.S.C. §636(b)(1); M.D. Pa. Local Rule 72.31.

Summary judgment is appropriate only when there is no genuine issue of material fact which is unresolved and the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c). Summary judgment should not be granted when there is a disagreement about the facts or the proper inferences which a fact finder could draw from them. Peterson v. Lehigh Valley Dist. Council, 676 F.2d 81, 84 (3d Cir. 1982). "When a motion for summary judgment is made and supported as provided in ...[Rule 56], an adverse party may not rest upon mere allegations or denials of the adverse party's pleading...." Fed. R. Civ. P. 56(e).

Initially, the moving party has a burden of demonstrating

the absence of a genuine issue of material fact. Celotex Corporation v. Catrett, 477 U.S. 317, 323 (1986). This may be met by the moving party pointing out to the court that there is an absence of evidence to support an essential element as to which the non-moving party will bear the burden of proof at trial. Id. at 325.

Rule 56 provides that, where such a motion is made and properly supported, the adverse party must show by affidavits, pleadings, depositions, answers to interrogatories, and admissions on file that there is a genuine issue for trial. Fed. R. Civ. P. 56(e). The United States Supreme Court has commented that this requirement is tantamount to the non-moving party making a sufficient showing as to the essential elements of their case that a reasonable jury could find in its favor. Celotex Corporation vs. Catrett, 477 U.S. 317, 322-23 (1986).

The Defendants' motion is based strictly on the narrow issue of whether Lavigne has exhausted his administrative remedies as required by the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a).[1] In Booth vs. Churner, 206 F.3d 289 (3d Cir. 2000), the Court of Appeals for the Third Circuit held for the first time that the exhaustion requirement in the Prison Litigation

[1]That section provides that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted."

Reform Act applies to actions based on the alleged use of excessive force. Id., at 291.

The evidentiary materials submitted by the Defendants establish that Lavigne did not exhaust his administrative remedies before he filed this action. Lavigne has not challenged that fact in either his brief opposing the Defendants' motion for summary judgment or his objections to the Magistrate Judge's report and recommendation. Instead, Lavigne primarily asserts that summary judgment for his failure to exhaust available remedies is inappropriate because of numerous alleged circumstances which arose after the filing of this lawsuit.[2] None of those allegations is relevant because they do not pertain to Lavigne's failure to exhaust his administrative remedies.

Lavigne's only comment in his objections with respect to the exhaustion requirement is that it would be futile because money damages are not available to him pursuant to the inmate grievance system. The Court of Appeals for the Third Circuit has explicitly rejected that argument. Nyhuis vs. Reno, 204 F.3d 65, 72 (3d Cir. 2000).

The undisputed facts demonstrate that Lavigne did not exhaust his administrative remedies before filing this lawsuit.

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[2]Those allegations include his failure to receive our order of June 12, 2000, and "that this litigation was hindered by actions of his cell mate and staff members" where he is currently incarcerated. (Document 88, p. 4.)

The Court of Appeals for the Third Circuit has held that such exhaustion is mandatory and that the failure to do so requires the dismissal of this action without prejudice. Id., at 300.

The Defendants contend that they are entitled to summary judgment in this case, as opposed to the dismissal of the action without prejudice, because Lavigne has "procedurally defaulted" the claims which gave rise to this action. The Magistrate Judge agreed with their argument that Lavigne is no longer able to pursue any administrative claim based on the allegations in this action because such a claim would be time-barred.

The only authority which the Defendants cite in support of that proposition is case law dealing with habeas corpus issues. Our limited research of the issue indicates that the principle of a "procedural default" exists exclusively within the context of post-conviction relief petitions and motions. Our view is that the principle of a "procedural default" does not apply in a civil rights action for damages.[3]

However, at this point we need not predict the manner in

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[3]The time limit within which an administrative complaint shall be filed was addressed somewhat obliquely in dicta in Nyhuis, which was a civil rights action. The Bureau of Prisons' regulations require an administrative complaint to be filed within 20 days after the event at issue in the complaint. 28 C.F.R. §§ 542.14(a). The Court of Appeals first noted that the applicable regulations allow for extensions of the deadlines "when the inmate demonstrates a good reason for the delay." Nyhuis, 204 F.3d at 77 n. 12 (citing 28 C.F.R. §§ 542.14(b), 542.15(a)).

which the Bureau of Prisons will consider any potential administrative claim filed by Lavigne. The two controlling cases, Booth and Nyhuis, convince us that the case should be dismissed without prejudice. See Ahmed vs. Sromovski, et al., 103 F. Supp. 2d 838 (E.D. Pa. 2000)(Brody, J.)(dismissing complaint without prejudice where defendants filed motion for summary judgment based on inmate's failure to exhaust administrative remedies).

We will adopt Magistrate Judge Durkin's report to the extent that it is based on Lavigne's failure to exhaust administrative remedies. We decline to adopt the recommendation that summary judgment be entered in favor of the Defendants because such a conclusion would be based on a prediction of the manner in which the Bureau of Prisons will address Lavigne's potential administrative claims.

NOW, THEREFORE, IT IS ORDERED THAT:

1. Lavigne's objections to the report and recommendation of Magistrate Judge (Document 88) are overruled.
2. Magistrate Judge Durkin's report and recommendation is adopted in large part.
3. The Defendants' motion for summary judgment (Document 80) is granted in part and denied in part as provided in this order.
4. Lavigne's complaint (Document 1) is dismissed without

prejudice.

5. The Clerk of Court shall send a copy of this order to Magistrate Judge Durkin.

6. The Clerk of Court shall close this case.

7. Any appeal from this order by Lavigne will be deemed frivolous, without probable cause, and not taken in good faith.

MUIR, U.S. District Judge

MM:ga

(Cite as: 211 F.3d 1269, 2000 WL 571948 (6th Cir.(Tenn.)))
C

NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA6 Rule 28 and FI CTA6 IOP 206 for rules regarding the citation of unpublished opinions.)

United States Court of Appeals, Sixth Circuit.

Randy Dale HILL, Plaintiff-Appellant,
v.
Charles JONES, Warden; Mattie Snow; Elsie Boles; Faus Capobianco, M.D.; Maninder Singh, M.D.; Pepito Y. Salcedo, M.D., Defendants-Appellees.

No. 98-5100.

May 3, 2000.

Before NORRIS and GILMAN, Circuit Judges; HOOD, District Judge. [FN*]

FN* The Honorable Joseph M. Hood, United States District Judge for the Eastern District of Kentucky, sitting by designation.

ORDER

**1 Randy Dale Hill appeals a district court order dismissing his civil rights action filed under 42 U.S.C. § 1983. The case has been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. See Fed. R.App. P. 34(a).

Seeking monetary, declaratory, and injunctive relief, Hill sued several Tennessee correctional and medical personnel in their individual and official capacities, alleging that the defendants failed to protect him from an attack by another inmate and did not provide him with adequate medical care. Over Hill's objections, the district court adopted the magistrate judge's report and recommendation and granted summary judgment for the defendants. Hill has filed a timely appeal.

We initially conclude that the district court should have dismissed Hill's failure to protect claim without prejudice because he did not exhaust any available administrative remedies for this claim. Under 42 U.S.C. § 1997e(a), a prisoner must exhaust all of his available administrative remedies before filing a § 1983 action in federal court, see Brown v. Toombs, 139 F.3d 1102, 1103-04 (6th Cir.), cert. denied, 525 U.S. 833, 119 S.Ct. 88, 142 L.Ed.2d 69 (1998), and the prisoner has the burden of demonstrating that he has exhausted these remedies. See id. at 1104. Before the district court adjudicates any claim set forth in the plaintiff's complaint, the court must determine that the plaintiff has complied with this exhaustion requirement. See id. Although money damages may not be available through the prison grievance process, Hill must still exhaust these state remedies because the prison has an administrative system that will review his complaints. See Freeman v. Francis, 196 F.3d 641, 643 (6th Cir.1999); Wyatt v. Leonard, 193 F.3d 876, 878-79 (6th Cir.1999). The prisoner must exhaust his remedies as to all claims arising from his confinement, including excessive force, equal protection, and other constitutional claims. See Hartsfield v. Vidor, 199 F.3d 305, 308 (6th Cir.1999) ; Freeman, 196 F.3d at 643-44. To establish that he has exhausted his administrative remedies prior to filing suit, a prisoner should attach to his § 1983 complaint any decision demonstrating the administrative disposition of his claims. See Wyatt, 193 F.3d at 878; Brown, 139 F.3d at 1104.

Hill has not met his burden of demonstrating that he exhausted his available administrative remedies for his failure to protect claim. Hill filed his complaint on November 15, 1996, alleging that he was attacked by another inmate on January 2, 1996, and that the defendants were deliberately indifferent to this threat to his personal safety. While the administrative exhaustion requirement set forth in § 1997e(a) applies to Hill's case because he filed his complaint after April 26, 1996, the effective date of the Prison Litigation Reform Act (PLRA), see Brown, 139 F.3d at 1104, he is required only to substantially comply with this requirement because the events giving rise to his claim occurred before the effective date of the PLRA. See Wolff v. Moore, 199 F.3d 324, 327-29 (6th Cir.1999); Wyatt, 193 F.3d at 879-80.

**2 Nonetheless, Hill did not substantially comply with the exhaustion requirement. The record does not reveal that Hill ever filed any grievance, complaint, or other notice with prison officials concerning their

alleged failure to protect him from the attack. Since no evidence exists that Hill made a good faith effort to provide the prison administration with notice of his complaint, see Wolff, 199 F.3d at 327; Wyatt, 193 F.3d at 880, this claim must be dismissed for failure to exhaust administrative remedies and remanded to the district court for dismissal without prejudice. See Hartsfield, 199 F.3d at 310; Freeman, 196 F.3d at 645. We note that Hill properly exhausted his administrative remedies for his remaining claim.

Upon review, we conclude that the district court properly granted summary judgment for the defendants on Hill's medical claim. This court renders de novo review of a district court order granting summary judgment. See Davis v. Sodexho, Cumberland College Cafeteria, 157 F.3d 460, 462 (6th Cir.1998). Summary judgment is proper if no genuine issue exists as to any material fact and the moving party is entitled to judgment as a matter of law. See id. The moving party has the burden of showing an absence of evidence to support the non-moving party's case. See EEOC v. Prevo's Family Mkt., Inc., 135 F.3d 1089, 1093 (6th Cir.1998). Once the moving party has met its burden of production, the non-moving party cannot rest on its pleadings, but must present significant probative evidence in support of the complaint to defeat the motion for summary judgment. See Hall v. Tollett, 128 F.3d 418, 422 (6th Cir.1997). The mere existence of a scintilla of evidence to support the plaintiff's position will be insufficient; rather, evidence must exist on which the jury can reasonably find in favor of the plaintiff. See id.

The defendants have met their burden of showing an absence of evidence to support Hill's medical claim. Hill alleges that, shortly after the attack by the inmate, he was operated on by Dr. Bennett at the Nashville Memorial Hospital, who recommended to the defendant medical personnel that they schedule Hill for additional surgery as soon as possible. Nonetheless, he asserts that a lengthy delay followed before he received additional surgery and this delay violated his Eighth Amendment rights. To establish a violation of his Eighth Amendment rights resulting from a denial of medical care, Hill must show that prison officials were deliberately indifferent to his serious medical needs. See Estelle v. Gamble, 429 U.S. 97, 106, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976); Brooks v. Celeste, 39 F.3d 125, 127 (6th Cir.1994). A prison official is deliberately indifferent when he acts with criminal recklessness, a state of mind that requires that he act with a conscious disregard to a substantial risk of serious harm to the prisoner. See Farmer v. Brennan, 511 U.S. 825, 837, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994). Complaints of malpractice or allegations of negligence are insufficient to entitle a plaintiff to relief. See Estelle, 429 U.S. at 105-06. A prisoner's difference of opinion regarding treatment does not rise to the level of an Eighth Amendment violation, see id. at 107, and, where the prisoner has received some medical attention and now disputes the adequacy of that treatment, the federal courts are reluctant to secondguess prison officials' medical judgments and to constitutionalize claims which sound in state tort law. See Westlake v. Lucas, 537 F.2d 857, 860 n. 5 (6th Cir.1976).

**3 The defendants have demonstrated that they were not deliberately indifferent to Hill's serious medical needs. Hill acknowledges that he received regular medical examinations and treatment after his surgery. His chief complaint appears to be that the defendant medical personnel did not follow Dr. Bennett's recommendation and schedule him for additional surgery shortly after the original surgery. However, a disagreement between medical personnel over the appropriate course of treatment is insufficient to establish an Eighth Amendment claim. See Keeper v. King, 130 F.3d 1309, 1314 (8th Cir.1997); Vaughan v. Lacey, 49 F.3d 1344, 1346 (8th Cir.1995). Since Hill received significant medical treatment from the defendants, his disagreement as to the adequacy of that treatment does not amount to an Eighth Amendment violation.

Lastly, Hill argues that the district court improperly denied his motion to amend his complaint. While this court generally reviews a district court's denial of a motion to amend for an abuse of discretion, the court renders de novo review when the district court bases its decision on the legal conclusion that the proposed amendment would be futile. See Hahn v. Star Bank, 190 F.3d 708, 715-16 (6th Cir.1999), cert. denied, --- U.S. ----, 120 S.Ct. 1423, 146L.Ed.2d 314 (2000). Hill sought to add the medical director of the facility where he was incarcerated as a defendant to his suit, but he alleges no additional facts against this individual than previously set forth against the original defendants. The district court properly denied the motion because Hill's underlying medical claim is meritless and the proposed amendment would have been futile.

Accordingly, this court affirms the district court's grant of summary judgment on Hill's medical claim,

vacates the court's grant of summary judgment on the failure to protect claim, and remands that claim for dismissal without prejudice. See Rule 34(j)(2)(C), Rules of the Sixth Circuit.

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

ABEL ROJAS :

Plaintiff :

vs. : CIV.NO. 92-1514

PHYSICIANS ASSISTANT WILLIAMS and ARNOLD REYES, Director, Health Care, USP Lewisburg,

Defendants :

MEMORANDUM AND ORDER

Plaintiff, Abel Rojas, an inmate at the United States Penitentiary, Lewisburg, Pennsylvania (hereinafter USP Lewisburg) filed this Bivens[1]-styled corplaint pursuant to 28 U.S.C. § 1331 on October 26, 1992. (Doc.No. 1). Both Defendants are members of the USP-Lewisburg medical staff. The Defendants in this action are Roland Williams, a Physician's assistant and Arnold Reyes, the Health Services Administrator. The Plaintiff alleges the Defendants violated his Eighth Amendment right to be free from cruel and unusual punishment when the Defendants allegedly were deliberately indifferent to Plaintiff's medical needs.

Defendants' filed a Motion to Dismiss or in the alternative for Summary Judgment, with a brief in support. (Doc.No. 7, 10 & 11). The Plaintiff has filed a Motion to demonstrate that a genuine issue for trial exist and Plaintiff request for jury trial. (Doc.No. 8). This Court will construe Plaintiff's Motion

1. See Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, (1971).

as a Motion in Opposition to the Defendants' Motion for Summary Judgment.

BACKGROUND

Plaintiff, was transferred from USP Atlanta to USP-Lewisburg on September 15, 1992. Upon arrival Plaintiff has been housed in the Special Housing Unit (SHU) at USP Lewisburg. Plaintiff alleges he told Defendant Williams while he was making his rounds at the SHU that he was in pain and he had a medical order from the doctor at another prison for a back brace. Plaintiff further states that after he told Defendant Williams the medical order was inside his property bag, Defendant Williams allegedly told him, "Don't Worry about it, I'll take care of it." Plaintiff alleges he spoke with Defendant Williams again on September 21, 22, and 23 about his back brace and back pain. However, Plaintiff states that Defendant Williams told him he would have to wait.(Doc.No. 1, para. 9).

On September 25, 1992, Plaintiff alleges he spoke with Defendant Reyes while he was making his rounds in Administrative Segregation. Plaintiff alleges he told Defendant Reyes he had pain in his back and that Plaintiff had a "prescription for a lumbro sacral back brace". Plaintiff alleges that Defendant Reyes told him he would have to check it out. (Doc.No. 1, para. 13).

On October 6, 1992, Plaintiff alleges he obtained a copy of his medical order and showed it to Defendant Williams who stated Plaintiff would have to see an orthopedic doctor.

Plaintiff alleges the Defendants violated his Eighth Amendment right when both were deliberately indifferent to his needs. In relief, Plaintiff seeks $8,000.00 in compensatory damages, $8,000.00 in punitive damages and $2,000.00 in nominal damages from each Defendant. Plaintiff also seeks attorney fees and court costs, and "such other and further relief this court deems just and proper."

DISCUSSION

Summary judgment is required where the non-moving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317 (1986). Although the "burden to demonstrate the absence of material fact issues remains with the moving party regardless of which party would have the burden of persuasion at trial," Levenios v. Stern Entertainment, 860 F.2d 1227, 1229 (3d Cir. 1988)(internal quotation marks and citation omitted), the moving party's "burden" under Rule 56(c) "is discharged by 'showing'- that is, pointing out to the District Court- that there is an absence of evidence to support the non-moving party's case." Celotex, 477 U.S. at 325.

A non-moving party may not "rest upon mere allegations, general denials or...vague statements ..." Quiroga v. Hasbro, Inc., 934 F.2d 497, 500 (3rd Cir.), cert. denied, 112 S.Ct. 376 (1991). If the non-moving party's evidence "is merely colorable,...or is not significantly probative,... summary

judgment may be granted." Gray, 957 F.2d 1078(quoting Anderson, 477 U.S. at 249-50).

Defendants challenge the adequacy of Plaintiff's claim that they deprived Plaintiff of his Eighth Amendment right. An inquiry into a prisoner's constitutional right to receive medical care begins with the Supreme Court's seminal decision in Estelle v. Gamble, 429 U.S. 97 (1976). The Court outlined that in order to state an Eighth Amendment claim for denial of medical care, the Plaintiff must prove specific facts which clearly demonstrate that the Defendants showed deliberate indifference to the Plaintiff's serious medical needs. Such indifference can be shown by the way a prison doctor treats a prisoner's serious medical needs, or by the doctor's intentional denial or delay or access to medical care or intentional delay with prescribed treatment, however, inadvertent failure to provide medical care is not a violation of the Eighth Amendment. Id. at 104-05.

The Third Circuit has interpreted the standard enunciated in Estelle as encompassing a two-pronged test: "it requires deliberate indifference on the part of the prison officials and it requires the prisoner's medical needs to be serious". Monomouth County Correctional Institutional Inmates v. Lanzaro, 834 F.2d 326 (3d Cir. 1987), cert. denied. 486 U.S. 1006 (1988)(citing Inmates of Allegheny County Jail v. Pierce, 612 F.2d 754 (3d Cir. 1979))). Defendants in the present case argue the Plaintiff failed to meet the serious medical need requirement

of the Monmouth County and failed to demonstrate deliberate indifference.

It is well settled that not every prisoner complaint of inadequate medical care rises to the level of a constitutional violation. White v. Napoleon, 897 F.2d 103, 108-09 (3d Cir. 1990). In fact, "mere medical malpractice cannot give rise to a violation of the Eighth Amendment." Id. Indeed, prison authorities are accorded considerable latitude in the diagnosis and treatment of prisoners. See Inmates of Allegheny County Jail v. Pierce, 612 F.2d 754, 762 (3d Cir. 1979); See Durmer v. O'Connor, 1993 W.L. 88623 (3rd Cir.(N.J.)) (quoting White v. Napoleon, 897 F.2d at 110 (3d Cir. 1990) ("Certainly, no claim is presented when a doctor disagrees with the professional judgment of another doctor. There may, for example be several ways to treat an illness.").

In prevailing in an action for inadequate medical care, a prisoner must show more than negligence; he must show deliberate indifference on the part of the prison staff toward his serious medical needs. See Estelle at 104-106. Deliberate indifference is more than inadvertence or a good faith error; it is characterized by "obduracy and wantonness." Whitley v. Albers, 475 U.S. 312, 319 (1986). The Third Circuit has held "that a prison official is deliberately indifferent when he knows or should have known of a sufficiently serious danger to an inmate. Young v. Quinlan, 960 F.2d 351, 361 (3d Cir. 1992). (emphasis in original). The Third Circuit stressed the words "should have

known" means "strong likelihood of harm must be so obvious that a lay person would easily recognize the necessity of preventive action", Young v. Quinlan, 960 F.2d at 361 (quoting Monmouth at 347). See also Farmer v. Carlson, 685 F.Supp. 1335, (M.D. Pa. 1988). In short, district courts will "disavow any attempt to second guess the propriety or adequacy or a particular course of treatment...[which) remains in a question of sound professional judgment." Bowring v. Godwin, 551 F.2d 44, 48 (4th Cir. 1977). Applying the above standard, the Court must determine whether material issues of fact exist regarding the Defendants' alleged deliberate indifference to Plaintiff's medical needs.

Defendant Williams.

A review of the record before the Court reveals that Defendant Williams is employed as a physician's assistant in the Health Services Department at USP-Lewisburg. Defendant Williams, in his own declaration, states he was assigned to make rounds through the SHU during the time period from September 20, 1992, through November 14, 1992. During this rotation period he spoke with and treated the Plaintiff at least five (5) times[2]. The first meeting was an inmate screening upon Plaintiff's arrival at USP-Lewisburg, where the Defendant noted Plaintiff complained of lower back pain but did not mention a back brace, nor request one. At the second meeting the Plaintiff again complained of

2. The dates the Defendant dealt with the Plaintiff were September 15, 1992, September 28, 1992, October 5, 1992, and October 13, 1992 and October 22, 1992.

lower back pain. At this time, Defendant Williams stated he examined the Plaintiff but failed to find any point of tenderness and determined the Plaintiff had a full range of motion in his lower back. Defendant Williams then prescribed medication, Motrin, for the Plaintiff. During the remaining three visits, the Defendant refilled the Plaintiff's prescription for medication, with the exception of the last visit on October 15, 1992, where the Defendant increased the dosage to twice the amount originally prescribed. (Doc.No. 11, exhibit 2). Furthermore, Defendant Williams states he cannot recall the Plaintiff speaking to him about a medical order authorizing him to wear a back brace nor having such an order on file in the medical department. Defendant Williams also stated that the Plaintiff was not only treated by him but also by other members of the medical staff for a total of thirty-one (31) times in less than a five month period. (Doc.No. 11, exhibit 2). This Court also notes the Plaintiff has not established the seriousness of his medical condition. Farmer v. Carlson, 685 F. Supp. 1335, 1339 (M.D. Pa. 1988). Plaintiff only illustrates he had a medical order from another doctor for a back brace. There is no evidence in the record where Defendant Williams was deliberately indifferent to Plaintiff's serious medical needs. At best, even if the Defendant was told that Plaintiff had a prescription for a back brace as the Plaintiff alleges, the Defendant's conduct did not rise to the level of a constitutional violation as set by this Circuit in Young v. Quinlan, supra. As this Court earlier

said, "prison authorities are accorded considerable latitude in the diagnosis and treatment of prisoners." Inmates of Allegheny County Jail v. Pierce, 612 F.2d at 762 (3rd Cir. 1979).

The Plaintiff, in response, has submitted declarations from two other inmates, Louis Sheptin and Albert Rapalo, who state they heard the Plaintiff ask Defendant Williams for a back brace. However, there is no evidence in either declaration where Defendant Williams acted intentionally to deprive Plaintiff of the back brace. In the absence of such evidence of intent, "no reasonable trier of fact could conclude that a constitutional violation occurred, i.e., that staff acted with deliberate indifference to a risk of serious personal injury". Bartsch v. Federal Bureau of Prisons, Nos. 92-7007 and 92-7090 (3d Cir. August 10, 1992)(unpublished).[3] Accordingly, the Plaintiff's claims against Defendant Williams are dismissed.

Defendant Reyes.

Plaintiff's allegation against Defendant Reyes must also fail for the same reasons. Plaintiff alleges Defendant Reyes was deliberately indifferent to his medical needs because he should have known that Plaintiff's continued denial of the back brace would cause Plaintiff additional suffering.

A review of the record reveals there is no evidence other than a mere allegation of deliberate indifference listed in the Plaintiff's complaint that establishes any liability against

3. In Bartsch, intentional or deliberate conduct was not alleged and thus the complaint was dismissed.

Defendant Reyes. The Plaintiff has failed to move beyond his pleading with an additional evidence in the form of declarations or affidavits to show where and how Defendant Reyes was deliberately indifferent to him.

Defendant Reyes has submitted a declaration to this Court where he declares that he does not recall speaking to the Plaintiff about a back brace during the date in question. Had the Plaintiff made a request to him regarding a back brace, Defendant Reyes states he would have referred it to the physician assistant working within the prison. Accordingly, there is an absence of evidence to support the Plaintiff's claim against Defendant Reyes and Plaintiff's claim is dismissed.

Administrative Remedies.

Plaintiff in the present case, in addition to requesting money damages, also seeks "any other relief the court deems just". This type of relief should first have been attempted through administrative channels prior to filing this case. In the event the Plaintiff prevailed, this Court may have ordered the Plaintiff to receive a back brace or other forms of medical treatment.

It is firmly established that a federal prisoner must first exhaust administrative remedies before seeking habeas corpus relief in federal court. See Young v. Quinlan, 960 F.2d 351, 356 n.8 (3d Cir. 1992)[4]; Veteto v. Miller, 794 F. 2d 98 (3d Cir.

4. In McCarthy v. Madigan, ____ U.S. ___ 112 S.Ct. 1081 (1992), the United States Supreme Court ruled that an inmate (continued...)

1986); United States ex rel. Sanders v. Arnold, 535 F. 2d 848 (3d Cir. 1976). The United States Court of Appeals for the Third Circuit, in Lyons v. U.S. Marshals, 840 F. 2d 202 (3d Cir. 1988), identified the various policies underlying the exhaustion requirement :

> First, adherence to the doctrine shows appropriate deference to Congress' decision, embodied in statute, that an independent administrative tribunal, and not the courts, should serve as the initial forum for dispute resolution. . .
>
> Second, the exhaustion doctrine illustrates respect for administrative autonomy by forbidding unnecessary judicial interruption of the administrative process. This autonomy allows the administrative tribunal to exercise its own discretion, apply its own special expertise, and correct its own errors, thereby promoting administrative responsibility and efficiency and minimizing the frequent and deliberate flouting of administrative processes which could weaken the tribunal's effectiveness.
>
> Third, the exhaustion requirement fosters judicial economy both by permitting the administrative tribunal to vindicate a complaining party's rights in the course of its proceedings, thereby obviating judicial intervention, and by encouraging the tribunal to make findings of fact on which courts can later rely in their decision making.

Id. at 205, citing Republic Indus., Inc. v. Central Pa. Teamsters Pension Fund, 693 F. 2d 290, 293 (3d Cir. 1982).

The Bureau of Prisons has established a multi-tier system whereby a federal prisoner may seek formal review of any aspect of his imprisonment. The procedures to be followed are set forth

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4. (...continued)
who filed a Bivens action seeking only money damages did not need to exhaust administrative remedies. However, in this situation, the Plaintiff has asked for "any other relief the court deems just."

in 28 C.F.R. §§542.10-542.16 (1987). First, "[i]nmates shall informally present their complaints to staff, and staff shall attempt to informally resolve any issue before an inmate files a request for Administrative Remedy." Id. §542.13(a). Second, "[i]f an inmate is unable to informally resolve his complaint, he may file a formal written complaint, on the appropriate form, within fifteen (15) calendar days of the date on which the basis of the complaint occurred." Id. §542.13(b). The Warden has fifteen (15) days to respond. See Id. §542.14. Finally, if the inmate is not satisfied with the Warden's response, the response may be appealed (on the appropriate form) to the Regional Director within twenty (20) calendar days from the date of the Warden's response. If the inmate is not satisfied with the Regional Director's response, that response may be appealed to the General Counsel within thirty (30) calendar days from the date of the Regional Director's response. Id. §542.15. The Regional Director and the General Counsel each have thirty days to respond. See Id. §542.14.

A review of the Bureau of Prisons records indicates that Plaintiff has not filed any administrative remedies on this issue. (Doc.No. 11, Exhibit 1, para. 4). The Plaintiff is aware of the administrative procedure but did not file any action in this case.[5]

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5. The Plaintiff did file an administrative remedy on November 17, 1992, regarding disciplinary action taken against him.

Accordingly, the Plaintiff's complaint will be dismissed for failure to exhaust administrative remedies as required by law.

CONCLUSION

Therefore, based on the above stated reasons, the Defendants Motion for Summary Judgment is GRANTED. The Clerk of Court is directed to close the case file.

An appropriate Order follows.

Richard P. Conaboy
United States District Judge

DATE: May 27, 1993

Only the Westlaw citation is currently available.

United States District Court, E.D. Pennsylvania.

William BOYD, Plaintiff,
v.
DEPARTMENT OF CORRECTIONS, et al., Defendants.

No. CIV. A. 99-4987.

Aug. 2, 2000.

MEMORANDUM

BUCKWALTER

*1 Presently before the Court is the Defendants' Motion to Dismiss. For the reasons stated below, the Motion is Granted.

I. BACKGROUND

Plaintiff William Boyd ("Boyd") is currently an inmate at the State Correctional Institute at Graterford ("Graterford"). He was transferred to that institution on January 11, 1999. Upon arrival, Boyd was assigned into Administrative Custody ("AC") and placed in the Restricted Housing Unit ("RHU"). Boyd claims that the reasons for his not being assigned to the general prison population were never adequately explained to him. A Program Review Committee ("PRC") meeting was held on January 28, 1999 regarding his AC status. During this meeting, Boyd was informed that he would have to sign a "tracking agreement" in order to be released into the general prison population, but he refused to do so. Boyd filed an appeal of the PRC decision to Graterford Superintendent Donald Vaughn ("Vaughn") concerning his AC status on several dates during 1999, but Vaughn never responded to these complaints. Boyd also appealed directly to Chief Hearing Examiner Robert Bitner, but these appeals were denied or ignored because of procedural difficulties. In July, 1999, Defendant Russell Smith explained to Boyd that he would not be released to the general population based on a security report. At a PRC hearing on September 2, 1999 the Plaintiff's request to see the report was denied, although he was told that it related to his history at other state correctional institutes. Plaintiff also claims that he requested to be transferred to a new cell, but his repeated requests were denied by various Defendants. Plaintiff was eventually assaulted and injured by his cellmate, Keith Clayborne.

The Plaintiff seeks relief under § 1983 for violations of his VIII and XIV Amendment rights. He also asserts that he was falsely imprisoned, denied access to the main law library and forced to do work he found "humiliating". The Plaintiff seeks compensatory damages of $25,000, punitive damages of $100,000. He also seeks the following prospective relief:

(1) access to the report which formed the basis of his assignment to AC;
(2) a release to the general population or transfer to a new facility; and
(3) a warning to his fellow inmates not to retaliate against him.

II. LEGAL STANDARD

When deciding to dismiss a claim pursuant to Rule 12(b)(6) a court must consider the legal sufficiency of the complaint and dismissal is appropriate only if it is clear that "beyond a doubt ... the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." McCann v. Catholic Health Initiative, 1998 WL 575259 at *1 (E.D.Pa. Sep. 8, 1998) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). The court assumes the truth of plaintiff's allegations, and draws all favorable inferences therefrom. See, Rocks v. City of Philadelphia, (3d Cir.1989). The Defendants here also raise jurisdictional issues pursuant to Rule 12(b)(1). Such motions also require the court to accept plaintiff's allegations as true. See Mortensen v. First Federal Savings and Loan Association, 549 F.2d 884, 891 (3d Cir.1977).

III. DISCUSSION

*2 Defendants seek to dismiss Plaintiff's claims because Boyd has failed to exhaust his administrative remedies. Prisoners must exhaust all administrative remedies before initiating a lawsuit pursuant to 42 U.S.C. § 1983. 42 U.S.C. § 1997(e) [FN1]; Nyhuis v.. Reno, 204 F.3d 65 (3d Cir.2000). As the Third Circuit stated in Jenkins v. Morton,

> FN1. "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted".

> [E]xhaustion promotes judicial efficiency in at least two ways. When an agency has the opportunity to correct its own errors, a judicial controversy may well be mooted, or at least piecemeal appeals may be avoided. And, even where a controversy survives administrative review, exhaustion of the administrative procedure may produce a useful record for subsequent judicial consideration, especially in a complex or technical factual context" 148 F.3d 257, 259 (3d Cir.1998), quoting McCarthy v. Madigan, 503 U.S. 140, 146 (1992).

Plaintiff has been incarcerated at Graterford since the treatment complained of arose, so the provisions of § 1997(e) apply to him. The Department of Corrections has adopted a Consolidated Inmate Grievance Review System. [FN2] As has been noted, the Department's inmate grievance system provides an adequate and meaningful legal remedy. See Waters v. Cmwlth, 509 A.2d 430, 433 (Pa.Cmwlth.1986).

> FN2. The Department maintains a prisoner grievance system which allows prisoners to seek review of problems which they experience during their period of incarceration. While the system is designed to provide for review and resolution of prisoner grievances at the most decentralized level possible, the system also provides for a review of the initial decision making and for possible appeal to the Department's central office. Copies of the grievance system procedures are made available to every prisoner under the Department's jurisdiction. See 37 Pa.Code § 93.9

Boyd never alleges that he filed grievances concerning some of the relief he seeks in the Amended Complaint. There is no dispute that he never grieved the protection received, the denial of access to the main law library or the refusal to provide the report which served as a basis for his assignment to RHU. Boyd does allege that he filed several appeals of his AC confinement in the RHU, but they were either denied or ignored. However, this was not part of the grievance procedure as required provided by DC-ADM-804. Boyd recognizes this, but essentially argues that attempting such a grievance would have been futile, considering the lack of attention his appeals had produced. However, futility does not excuse the exhaustion requirements under the Prison Litigation Reform Act ("PLRA"). See Nyhuis, 204 F.3d at 71. The PLRA requires an inmate to exhaust all administrative remedies prior to bringing a federal action challenging prison conditions, whether or not they provide the inmate with the relief the inmate says he or she desires in the federal action. Id. Therefore, since the Plaintiff has not alleged that he had pursued his administrative remedies to final review, his Amended Complaint will be dismissed.

Boyd can pursue his administrative remedies at SCI Graterford. If he is not satisfied with the result of such procedures, he may then refile a complaint in federal court. However, if Boyd's administrative remedies are now time-barred, the judgment of the Court will not be affected. It would be contrary to Congress's intent in enacting the PLRA to allow inmates to bypass the exhaustion requirement by declining to file administrative complaints and then claiming that administrative remedies are time-barred and thus not then available. See Wright v. Morris, 111 F.3d 414, 417 (6th Cir.1997); Marsh v. Jones, 53 F.3d 707 (5th Cir.1995) (District Court could dismiss prisoner's 1983 claims under § 1997(e) even when administrative relief is time-barred).

IV. CONCLUSION

***3** The Plaintiff has failed to allege exhaustion of administrative remedies as required under § 1997(e). Therefore, the Amended Complaint is dismissed with prejudice.

An appropriate order follows.

ORDER

AND NOW, this 2nd day of August, 2000, upon consideration of the Defendants' Motion to Dismiss (Docket No. 22), and the Plaintiff's Response thereto (Docket No. 30); it is hereby ORDERED that the Motion is GRANTED.

This case is marked CLOSED.

END OF DOCUMENT

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

ROBERT LEON BUCKNER, Plaintiff	:	
v.	:	Civil No. 1:CV-00-1594
	:	(Caldwell, J.)
DR. ANTHONY BUSSANICH, M.D., and DONALD ROMINE, Warden, USP, Defendants	:	

CERTIFICATE OF SERVICE BY MAIL

The undersigned hereby certifies that she is an employee in the Office of the United States Attorney for the Middle District of Pennsylvania and is a person of such age and discretion as to be competent to serve papers.

That on January 29, 2001, she served a copy of the attached

BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

by placing said copy in a postpaid envelope addressed to the person hereinafter named, at the place and address stated below, which is the last known address, and by depositing said envelope and contents in the United States Mail at Williamsport, Pennsylvania.

Addressee:

Robert Leon Buckner
Reg. No. 33001-037
LEC Unit K01-009L
P.O. Box 2000
Lewisburg, PA 17837

Michele E. Lincalis

MICHELE E. LINCALIS
Paralegal Specialist